BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NOS 24-960–1995 AND 24–894–1995
ABDUL MALIK ISHAK J
10 JANUARY 1996

Companies and Corporations *— Winding up — Stay of order — Consent order to stay winding-up order — Whether winding-up order made inoperative or suspended by consent order for stay*

Companies and Corporations *— Winding up — Disposition of property — Whether transfer of company's money from its fixed deposit account to its current account constituted a disposition of its property — Companies Act 1965 s 223*

Companies and Corporations *— Winding up — Construction of order of stay of winding up — Whether bank entitled to seek validating order for disposition of property of company subject to winding up — Effect of words in the order of stay*

River View Properties Sdn Bhd ('River View') maintained two fixed deposits (FD/93/0009311/11 and FD/93/0011018/01) with BSN Commercial Bank (Malaysia) Bhd ('the bank'). On 14 February 1995, the bank received a written notice from the Official Receiver ('the OR') that River View had been wound up on 28 November 1994. On or about 27 February 1995, River View wrote to the bank seeking the release of the accrued interest for FD/93/0009311/11 and to roll over the principal sum on a three-month basis. By letter dated 8 May 1995, the OR informed the bank that the winding-up order of River View had been stayed by a consent order dated 21 December 1994. On 25 July 1995, River View wrote to the bank and sought the release of the money in FD/93/0009311/11 for the purpose of the 'day-to-day running and management of the company and payment of dividends'. River View's solicitors wrote to the bank stating that the transfer of its fixed deposit to its current account did not constitute a disposal of assets within s 223 of the Companies Act 1965 ('the Act'). The bank, being wary, sought legal advice and wrote to River View's solicitors and the OR seeking clarification on the situation. The bank then wrote to both River View's and the petitioner's solicitors and requested their consent to an application to the court to validate the release of the fixed deposits, but was unable to get the consent from all parties concerned. The bank filed an originating summons seeking: (i) the determination as to whether River View was entitled to the money held in the account of the bank for the fixed deposit; and (ii) in the event the determination was in the affirmative, for an order that the bank be authorized to make payment of all money held by the bank in the two fixed deposits to River View. River View had also filed an originating summons seeking: (i) a

A determination whether the bank had contravened the law by holding on to money which were due to River View; and if the answer was in the affirmative, whether the bank had committed contempt of court by going against the consent order for the stay of the winding-up order; and (ii) an order that the bank forthwith released the money owing together with interest to River View. The two originating B summonses were heard together. The court was asked to construe the consent order, especially the words 'and it is also ordered that the directors do undertake not to dispose of the assets of the company by any means whatsoever except for the payment of expenditure for the day-to-day running and management of the company and payment C of dividends', in favour of River View.

Held, granting a validation order for the release of the fixed deposits:

(1) The effect of the consent order for the stay of the winding-up order was to make inoperative or suspended the winding up of D River View. The bank had acted cautiously and were justified in taking that stand. It was only obeying strictly the consent order for the stay of the winding up and could not be held in contempt for so acting. The order of a stay of the winding-up order, if expressed in unlimited terms, would put an end to the winding-up process and the company could thereupon resume the conduct E of its business and affairs as if no winding up existed at all (see p 880B–E); *Krextile Holdings Pty Ltd v Widdows* (1974) VR 689 and *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 followed.

(2) Payments in and out of River View's account constituted F dispositions of River View's property within the meaning of s 223 of the Act. Under s 223, any disposition of a company's property after the commencement of the winding up by the court shall, unless the court otherwise orders, be void. Thus, each case has to be looked at on its own facts and circumstances; the judge's G commonsense opinion of what is just and fair prevails. In deciding the existence of good faith and honest intention, the absence of knowledge by the transferee of the winding-up petition is a very powerful factor in favour of validation. The court would always have regard as to whether the disposition was made bona fide in the course of the company's current trade and, if not, whether H the company's trade would be paralysed without any advantage. In the instant case, River View needed the money to pay dividends and to run its daily affairs, without which River View would be paralysed. Accordingly, the dispositions should be validated in River View's favour (see pp 880I, 882G–H and 883A–B); *Re* I *Clifton Place Garage Ltd* [1970] Ch 477; *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 and *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 followed.

(3) Dividends need not be paid in cash and there is no necessity that there be available profits when the dividend is actually paid. What is important is that there were available profits when the dividend was declared. In the instant case, once River View validly declared a dividend, it is considered a debt owed by River View to its members which is immediately payable. Thus, the crucial words in the consent order, namely, 'except for the payment of expenditure for the day-to-day running and management of the company and payment of dividends', should be read in favour of the bank and for River View in their respective originating summonses. Both the bank and River View were right in seeking validation orders from the court prior to the release of the two fixed deposits belonging to River View which was the subject of a winding-up order (see p 883D–F).

[Bahasa Malaysia summary

River View Properties Sdn Bhd ('River View') mempunyai dua simpanan tetap (FD/93/0009311/11 dan FD/93/0011018/01) di BSN Commercial Bank (Malaysia) Bhd ('bank itu'). Pada 14 Februari 1995, bank itu telah menerima satu notis bertulis daripada Pegawai Penerima ('PP') yang menyatakan bahawa River View telah digulungkan pada 28 November 1994. Kira-kira pada 27 Februari 1995, River View menulis kepada bank itu untuk meminta supaya faedah terakru bagi FD/93/0009311/11 dilepaskan dan wang dipusing pada dasar pusingan tiga bulan. Melalui surat bertarikh 8 Mei 1995, PP memberitahu bank itu bahawa perintah penggulungan River View telah digantung oleh satu perintah persetujuan bertarikh 21 Disember 1994. Pada 25 Julai 1995, River View menulis kepada bank itu dan meminta supaya wang dalam FD/93/0009311/11 dilepaskan bagi tujuan 'perjalanan dan pengurusan harian syarikat dan bagi bayaran dividen'. Peguamcara kepada River View telah menulis kepada bank itu dan menyatakan bahawa pemindahan simpanan tetap River View ke akaun semasanya bukan merupakan satu pelupusan aset dalam erti kata s 223 Akta Syarikat 1965 ('Akta tersebut'). Bank itu, sebagai langkah waspada, telah meminta nasihat undang-undang dan menulis kepada peguamcara River View dan juga kepada PP meminta penjelasan tentang situasi itu. Bank itu kemudiannya telah menulis kepada kedua-dua peguamcara River View dan pempetisyen untuk meminta persetujuan mereka terhadap satu permohonan kepada mahkamah untuk mengesahkan pelepasan simpanan tetap tersebut, namun ia tidak berjaya mendapat persetujuan daripada kesemua pihak yang terlibat. Bank itu memfailkan satu saman pemula untuk memohon: (i) penentuan sama ada River View berhak terhadap wang yang dipegang dalam akaun bank untuk simpanan tetap; dan (ii) sekiranya penentuan itu adalah afirmatif, untuk satu perintah supaya bank itu diberikuasa membayar kesemua wang yang dipegang oleh pihak bank dalam dua simpanan tetap kepada River View. River

View juga telah memfailkan satu saman pemula untuk memohon: (i) satu penentuan sama ada bank itu telah melanggar undang-undang dengan memegang wang yang patut dibayar kepada River View; dan jika jawapannya adalah ya, sama ada bank itu telah menghina mahkamah kerana tidak mematuhi perintah persetujuan bagi menggantung penggulungan; dan (ii) satu perintah supaya bank itu dengan serta-merta melepaskan wang yang patut dibayar berserta faedah kepada River View. Kedua-dua saman pemula didengar secara bersama. Mahkamah telah diminta mentafsirkan perintah persetujuan tersebut, terutama perkataan-perkataan 'and it is also ordered that the directors do undertake not to dispose of the assets of the company by any means whatsoever except for the payment of expenditure for the day-to-day running and management of the company and payment of dividends', yang memihak kepada River View.

Diputuskan, memberikan satu perintah kesahan untuk melepaskan simpanan-simpanan tetap itu:

(1) Perintah persetujuan untuk menggantung perintah penggulungan itu berkesan menjadikan penggulungan River View tidak berkuat kuasa atau digantung. Pihak bank telah bertindak secara berhati-hati dan mempunyai justifikasi untuk mengambil pendirian itu. Bank itu hanya telah mematuhi dengan betul-betul perintah persetujuan untuk menggantung perintah penggulungan itu dan tidak boleh didapati menghina mahkamah kerana bertindak demikian. Perintah untuk menggantung perintah penggulungan itu, jika dinyatakan dalam terma-terma yang tidak terhad, akan menamatkan proses penggulungan tersebut dan dengan itu syarikat itu boleh memulakan semula perniagaan dan urusannya seolah-olah penggulungan tidak wujud sama sekali (lihat ms 880B–E); *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 dan *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 diikut.

(2) Bayaran-bayaran masuk dan keluar daripada akaun River View merupakan pelupusan harta River View dalam erti kata s 223 Akta tersebut. Di bawah s 223, setiap pelupusan harta sesebuah syarikat yang dibuat setelah penggulungan syarikat yang dimulakan oleh mahkamah akan, melainkan jika mahkamah memerintah sebaliknya, dikira tak sah. Oleh itu, setiap kes hendaklah dilihat atas fakta dan keadaan sendiri; pendapat akal budi hakim tentang apa yang dikira adil dan berpatutan diutamakan. Dalam memutuskan sama ada suci hati dan niat jujur, kedudukan wujud, ketiadaan pengetahuan pada pihak penerima pemindah tentang petisyen penggulungan itu adalah satu faktor yang sangat kuat yang boleh menyumbang kepada kesahan. Mahkamah akan sentiasa mengambil kira sama ada pelupusan itu telah dibuat secara bona fide berhubung dengan perniagaan semasa syarikat itu, dan jika tidak, sama ada

perniagaan syarikat itu akan dilumpuhkan tanpa sebarang manfaat. Dalam kes ini, River View memerlukan wang itu untuk membayar dividen dan untuk menjalankan urusan hariannya, dan tanpa wang tersebut, River View akan menjadi lumpuh. Oleh yang demikian, pelupusan-pelupusan itu hendaklah disahkan, bagi manfaat River View (lihat ms 880I, 882G–H and 883A–B); *Re Clifton Place Garage Ltd* [1970] Ch 477; *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 dan *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 diikut.

(3) Dividen-dividen tidak perlu dibayar dalam bentuk wang tunai, dan adalah tidak perlu bahawa keuntungan wujud apabila dividen itu dibayar kelak. Apa yang penting ialah bahawa terdapat keuntungan semasa dividen diumumkan. Dalam kes ini, apabila River View mengumumkan satu dividen secara sah, ianya dikira sebagai satu hutang daripada River View kepada ahli-ahlinya yang mesti dibayar dengan serta merta. Oleh itu, perkataan-perkataan yang penting dalam perintah persetujuan itu, iaitu, '*except for the payment of expenditure for the day to day running and management of the company and payment of dividends*', hendaklah dibaca sebagai memihak kepada bank itu dan kepada River View dalam saman pemula mereka masing-masing. Kedua-dua bank itu dan River View telah bertindak dengan betul dalam memohon perintah-perintah kesahan daripada mahkamah sebelum pelepasan kedua-dua simpanan tetap kepunyaan River View yang menjadi perkara dalam satu perintah penggulungan (lihat ms 883D–F).

Notes

For cases on the stay of a winding-up order, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 558–559.

For cases on the disposition of property after a winding-up order, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 413–416.

Cases referred to

Argentum Reductions (UK) Ltd, Re [1975] 1 All ER 608
Civil Service and General Store Ltd, Re (1887) 57 LJ Ch 119
Clifton Place Garage Ltd, Re [1970] Ch 477
Diplock's Estate, Re [1948] 2 All ER 318
Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814
Industrial Equity Ltd v Blackburn (1977) 3 ACLR 89
J Leslie Engineers Co Ltd (In liquidation), Re [1976] 1 WLR 292
Krextile Holdings Pty Ltd v Widdows (1974) VR 689
Marra Developments Ltd v BW Rofe Pty Ltd (1977) 3 ACLR 185
Severn and Wye and Severn Bridge Rly Co, Re [1896] 1 Ch 559
Steane's (Bournemouth) Ltd, Re [1950] 1 All ER 21
Thomson v Henderson's Transvaal Estates Ltd [1908] 1 Ch 765
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830

Legislation referred to

Companies Act 1965 ss 223, 365(1)
Companies Act 1948 s 227 [UK]
Insolvency Act 1986 s 127 [UK]

Wong Kim Fatt (Hong Chin Heng with him) *(Gulam & Wong)* for River View.
JBR Netto (Nijar Kumar Netto & Partners) for the bank.
SL Goh (Shook Lin & Bok) for the petitioner.
Jegathesen for the Official Receiver.

Abdul Malik Ishak J: From the affidavits, the facts of these two originating summonses were on all fours with one another and consequently, for convenience, they were heard together. The facts of these two originating summonses may be stated thus.

River View Properties Sdn Bhd ('River View') maintained two fixed deposits with BSN Commercial Bank (Malaysia) Bhd ('the bank') and the particulars of these two fixed deposits were:

(1) FD/93/0009311/11

RM	*Starting Date*	*Maturity Date*	*Rate*	*Tenure*
407,625.12	14.07.95	14.10.95	5.8%	3 months

(2) FD/93/0011018/01

RM	*Starting Date*	*Maturity Date*	*Rate*	*Tenure*
656,613.63	24.05.95	24.08.95	5.90%	3 months

On 14 February 1995, the bank received a written notice from the Official Receiver's office ('the OR'), wherein it was stated, inter alia, that River View had been wound up on 28 November 1994. On or about 27 February 1995, River View wrote a letter to the bank seeking, inter alia, the release of the accrued interest for FD/93/0009311/11, and to roll over the principal sum on three months' basis. The OR by letter dated 8 May 1995 informed the bank that by consent, the winding-up order of River View had been stayed. That consent order for the stay of the winding up was dated 21 December 1994. To date, the bank had not been served with the winding-up petition and the orders made therein. On 25 July 1995, River View wrote to the bank and sought for the release of the money in the fixed deposit vide FD/93/0009311/11. This request was again repeated by River View in their letter to the bank on 26 July 1995. The letter dated 25 July 1995 spoke of the need to utilize the money for purposes of *'day to day running and management of the company and payment of dividends.'* On or about 31 July 1995 and 16 August 1995, Messrs Gulam & Wong, the solicitors for River View, wrote to the bank stating that the transfer of the fixed deposit of River View to the current account of River View did not constitute a disposal of assets. The bank, being wary, sought legal advice and through their solicitors Messrs Nijar, Kumar, Netto & Partners wrote

to Messrs Gulam & Wong and the OR vide letters dated 7 August 1995 and sought clarifications as to what had happened thus far. On or about 22 August 1995 and 25 August 1995, the bank's solicitors wrote to Messrs Gulam & Wong and also to Messrs Shook Lin & Bok ('the petitioner's solicitors') and requested them to consent to an application to the court to validate the release of the two fixed deposits. Whilst Messrs Shook Lin & Bok have no objections, Messrs Gulam & Wong refused to give their consent. Surprisingly, before me the positions reversed. It was Messrs Gulam & Wong that supported the application and in fact filed an application to that effect vide Originating Summons No 24–894 of 1995 whilst Messrs Shook Lin & Bok objected to it. Be that as it may, on 25 August 1995, the bank's solicitors wrote to the OR and requested their permission to release the moneys. The OR responded and took the stand that they were not in a position to advise, and left the matter to the bank's solicitors to do what was right.

From the facts as narrated above, it is clear that the bank acted prudently and cautiously and at all times, they were keen to transfer all the moneys plus the interests in the two fixed deposits to River View provided they obtained the blessings of the court. River View was equally keen to lay their hands on FD/93/0009311/11.

I am asked to construe the consent order dated 21 December 1994, especially the words:

> And It Is Also Ordered that the directors do undertake not to dispose of the assets of the company by any means whatsoever except for the payment of expenditure for the day to day running and management of the Company and payment of dividends

in favour of River View.

The petitioner who petitioned for the winding up of River View on 28 November 1994 was none other than Lim Mong Sam @ Lim Ah Tee. Miss SL Goh, for the petitioner, agreed that the petitioner would be happy to see River View bounced back to life. Mr Wong Kim Fatt, the learned counsel for River View, argued with vigour and vitality to the effect that River View needed the moneys to run the affairs of the company on a day-to-day basis and for the payment of dividends. Mr JBR Netto for the bank shared Mr Wong Kim Fatt's sentiments and submitted on the same lines as Mr Wong Kim Fatt.

The bank filed encl 3 vide Originating Summons No 24–960 of 1995 and sought the following prayers:

(a) for a determination as to whether River View is entitled to the money presently held in the account of the bank vide account No FD/93/0011018/01;

(b) in the event that the determination is in the affirmative, for an order that the bank be authorized to make the payment of all money held by the bank vide account No FD/93/0011018/01 and account No FD/93/0009311/11 to River View;

(c) further and/or any relief deems fit by the court; and

(d) costs to be paid by River View.

River View, too, filed encl 4 vide Originating Summons No 24–894 of 1995 and sought two prayers, namely:

(1) for a determination whether the bank contravened the law by holding on to RM350,000 which was due to River View and, if the answer is in the affirmative, whether the bank had committed contempt of court by going against the consent order for the stay of the winding up; and

(2) an order that the bank forthwith release the sum of RM350,000 together with interest to River View.

The OR submitted that since the winding-up petition dated 28 November 1994 and the consent order to stay that winding up dated 21 December 1994 were handled by Haidar J, these two originating summonses should be handled by him, and not by me. I beg to disagree. The issues raised in these two originating summonses were entirely different. It revolved on the interpretation of the consent order that stayed the winding up and I certainly have the jurisdiction to adjudicate upon the subject matter.

What is the effect of the consent order for the stay of the winding up dated 21 December 1994? The answer is found in the recent Court of Appeal case of *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 where NH Chan JCA delivering the judgment of the court said (at p 833):

> The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings. In 2 *Jowitt's Dictionary of English Law* (2nd Ed) under 'Stay' at pp 1701–1702, after stating that the term 'stay of proceedings' can mean a total discontinuance of an action, it says this:
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> > '... but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment.'

In another part of the judgment at p 834, his Lordship NH Chan JCA continued in cautious terms:

> The stay of operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order. It does not mean that the said order has been wiped out from existence: see *Shree Chamundi Mopeds Ltd v Church of South India Trust Association* (1992) 3 SCC 1 at p 9; AIR 1992 SC 1439, and Supreme Court on Words and Phrases (1993) at p 659. Therefore the effect of the order of the then Supreme Court ordering a stay of the order of the High Court dated 22 March 1994 is that the order of the High Court of 22 March 1994 would not be operative from the date of the passing of the stay order of the then

Supreme Court. It does not mean that the order of the High Court dated 22 March 1994 staying all further proceedings under the winding up order dated 5 September 1989 has been wiped out from existence. The order of the High Court dated 22 March 1994 ordering an indefinite or permanent stay of the winding up proceedings is still in existence although, for the time being, inoperative or suspended until the appeal is heard by the Federal Court when it can either be set aside or affirmed.

Thus, the consent order for the stay of the winding up dated 21 December 1994 made 'inoperative or suspended' the winding up of River View on 28 November 1994. That was cold comfort for River View and when the bank acted cautiously, they were justified to take that stand. The bank was only obeying strictly the consent order for the stay of the winding up and they cannot be held in contempt for so acting. It must not be forgotten that when River View was put into liquidation by the petitioner Lim Mong Sam @ Lim Ah Tee, it underwent a change of status as envisaged in *Thomson v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 765 at p 778 per Buckley LJ. Although River View's corporate status and powers are not as such affected by the liquidation, yet it exists thereafter only for the purpose of being wound up; River View directors' powers pass to the liquidator and there would be restriction on the alienation of its property and on the right to take proceedings and levy execution against it. However, all these can change and has, in fact, changed when by consent, the court stayed proceedings in the winding up. *Krextile Holdings Pty Ltd v Widdows* (1974) VR 689 at pp 693–694 laid down a principle akin to that of *Vijayalakshmi Devi* in that the order of a stay of the winding up, if expressed in unlimited terms, would put an end to the winding-up process and the company can thereupon resume the conduct of its business and affairs as if no winding up existed at all. Mr Wong Kim Fatt modelled his arguments on *Krextile Holdings Pty Ltd v Widdows* and drove home the message that River View was not shackled by the winding-up order as the stay lifted River View from its slumber, and River View could now resume the conduct of its business. Mr Wong Kim Fatt further argued that River View was floundering and it needed money to float. I venture to say that once the stay for winding up was granted by the court, even the role of the OR was minimized. I am fortified in my view by a passage appearing in 7(2) *Halsbury's Laws of England* (4th Ed Reissue) para 1528, where the learned author said: 'If proceedings in the winding up are stayed by order of the court, any duty of the official receiver to send reports ceases.'

The request by Messrs Gulam & Wong, the solicitors for River View, for the transfer of the fixed deposit of River View to the current account of River View as adverted to in the early part of this judgment raises an interesting question of law, namely, whether an exercise of that nature would constitute disposition of River View's property. In *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814, the Court of Appeal reversed a decision of Templeman J where he held that payments of cheques to a bank in circumstances where the company was throughout running an overdraft were not dispositions of property within s 227 of the Companies Act 1948 (the predecessor of s 127 of the Insolvency Act 1986). Buckley

LJ, speaking for the Court of Appeal, said ([1980] 1 All ER 814 at p 818; [1980] 1 WLR 711 at p 715):

> The judge proceeded on the basis, which he held to be the position in law, that payment of moneys to the credit of a company's account, whether it is in credit or not, do not constitute a disposition of the company's property. That is a view with which, with deference to the judge, I feel unable to agree. When a customer's account with his banker is overdrawn he is a debtor to his banker for the amount of the overdraft. When he pays a sum of money into the account, whether in cash or by payment in of a third party's cheque, he discharges his indebtedness to the bank pro tanto. There is clearly in these circumstances, in my judgment, a disposition by the company to the bank of the amount of the cash or of the cheque. It may well be the case, as counsel for the bank has submitted, that in clearing a third party's cheque and collecting the amount due on it, the bank acts as the customer's agent, but as soon as it credits the amount collected in reduction of the customer's overdraft, as in the ordinary course of banking business it has authority to do in the absence of any contrary instruction from the customer, it makes a disposition on the customer's behalf in its own favour discharging pro tanto the customer's liability on the overdraft. Counsel for the bank was constrained in the course of argument to accept that this is so. In the present case the company's account with the bank was overdrawn, so I need not consider what the position would have been if any cheque had been paid in when the account was in credit, but I doubt whether even in those circumstances it could be properly said that the payment in did not constitute a disposition of the amount of the cheque in favour of the bank.

In *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292, the facts were that in 1970, H, a director of a company, sub-contracted work for the company to the respondents. After completion, an invoice for £1,050 was sent by the respondents to the company. It was not paid despite several requests for payment. A petition to wind up the company was presented on 14 September, and advertised on 25 September. The respondents did not know of the petition. On 2 October, a cheque for £250 to be drawn on the company's bank account was made out to 'cash' and signed by H 'for the company'. H cashed the cheque and bought with the money five money orders of £50 each made out in favour of the respondents which he sent to them. On 5 November, a cheque for £800 drawn on the personal joint bank account of H and his wife was sent to the respondents. H told the respondents to represent the cheque if it was not met. On 11 November, the cheque was presented but was returned marked 'refer to drawer, please represent'. On 17 November, H paid into the joint account a cheque drawn on the company's account in his favour for £800, together with other cheques. The account had a credit balance of £950. On 20 November, the respondents' cheque was represented and honoured. In December, an order was made winding up the company. The liquidator sought a declaration that the cheques for £250 and £800 were dispositions of the company's property made after the commencement of the winding up and were accordingly void under s 227 of the Companies Act 1948. It was held that the liquidator was entitled to claim repayment of the sum of £250. It

was money paid to the respondents by a director of the company with which they knew they were dealing and they should have drawn the natural inference that it was the company's money. The bank notes were as much the company's property as the money in the account and, despite their conversion into money orders, they remained identifiable as such. The payment was clearly intended by H to be preferential. It was, therefore, avoided by s 227 and the court should not exercise its discretion to validate it (*Re Civil Service and General Store Ltd* (1887) 57 LJ Ch 119 applied). It was further held that the liquidator's claim for repayment of the sum of £800, however, failed. Although the respondents were aware that they were contracting with a limited company, there was no indication that they knew or had any reason to suspect that the funds used for payment of the £800 had been provided by the company. The company's money paid into H's joint account became mixed with H's money and lost its identity. The meeting by the bank of the represented cheque was, therefore, not a *'disposition of the property of the company'* within s 227. The liquidator did not have a personal claim against the respondents. They could not be treated as volunteers who had received trust moneys but, even if they could, there could be no claim against them until the liquidator had exhausted his remedies against the persons primarily responsible, ie H and the bank. That he had failed to do. Moreover, there was no evidence that the money remained traceable (*Re Diplock's Estate* [1948] 2 All ER 318 applied).

Section 223 of the Companies Act 1965 enacts as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

There are similar provisions in the United Kingdom: see s 227 of the Companies Act 1948 and s 127 of the Insolvency Act 1986.

Dispositions are said to be void under s 223 of the Companies Act 1965 *'unless the Court otherwise orders'*. Thus, each case must be approached and dealt with on its own facts and circumstances. No two cases are the same. It revolves on the good faith and honesty of the personalities, and it is here that the judge's commonsense opinion of what is just and fair prevails: *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at p 25; *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 at p 304 laid down the now classic principle that in deciding the existence of good faith and honest intention, the absence of knowledge by the transferee of the winding-up petition was a very powerful factor in favour of validation. Incidentally, it is pertinent to note that in *Re Gray's Inn Construction Co Ltd*, it was held that the court should not validate a transaction if its effect was to pay off a creditor in full at the expense of the general creditors. Mr Wong Kim Fatt, at the Bar, informed this court that River View had no creditors, and consequently, he submitted that this court should validate the release of the fixed deposits to the current account of River View. It is

my judgment that the court will always have regard as to whether the disposition was made bona fide in the course of the company's current trade, and if not validated, the trade of the company would be paralysed without any advantage as envisaged in *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA). Likewise here, as Mr Wong Kim Fatt rightly pointed out that River View needed the money to pay dividends and to run its daily affairs, without which River View would be paralysed, and on these grounds, the validation of the dispositions should be ordered in favour of River View and I so ordered accordingly. If an ordinary shareholder may apply for validation of a disposition, as granted in *Re Argentum Reductions (UK) Ltd* [1975] 1 All ER 608, why can't the bank or even River View be given the same privilege?

On the question of payment of dividends, s 365(1) of the Companies Act 1965 enacts as follows:

> No dividend shall be payable to the shareholders of any company except out of profits or pursuant to section 60.

Now, dividends need not be paid in cash. They can be paid in the form of shares. There is also no necessity that there be available profits when the dividend is actually paid. What is important is that so long as there were available profits when the dividend was declared that would be sufficient to come within the purview of *Marra Developments Ltd v BW Rofe Pty Ltd* (1977) 3 ACLR 185. It is germane to remember that once River View validly declares a dividend, it is considered a debt owed by River View to their members, which must necessarily include the petitioner Lim Mong Sam @ Lim Ah Tee (see *Re Severn and Wye and Severn Bridge Rly Co* [1896] 1 Ch 559; *Industrial Equity Ltd v Blackburn* (1977) 3 ACLR 89 at p 93). Such debt is immediately payable, and if not paid when it is due, the member may sue for it. It is my judgment that the crucial words in the consent order dated 21 December 1994, namely, *'except for the payment of expenditure for the day to day running and management of the company and payment of dividends'* should be read in favour of the bank vide Originating Summons No 24–960 of 1995 and for River View vide Originating Summons No 24–894 of 1995.

To recapitulate, it is my judgment that:

(1) payments in and out of River View's account constitute dispositions of River View's property within the meaning of s 223 of the Companies Act 1965;

(2) the bank was entitled to seek the sanction of this court for a validating order to release money belonging to River View which was the subject of winding up for:

  (a) the day-to-day running expenses of River View; and

  (b) payment of dividends;

(3) both the bank and River View were perfectly right in seeking validation orders from this court prior to the release of the two fixed deposits belonging to River View which was the subject of a winding up.

For these reasons, I granted prayers (a) and (b) of encl 3 vide Originating Summons No 24–960 of 1995. I also granted prayer 2 of encl 4 in Originating Summons No 24–894 of 1995. In regard to these two originating summonses, I refused to make an order as to costs.

Order accordingly.

Reported by TL Lim